IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-KA-01135-COA

LOREN SHELL-BLACKWELL A/K/A LOREN DANIELLE SHELL-BLACKWELL A/K/A LORAN DANIELLE SHELL-BLACKWELL — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	06/21/2018
TRIAL JUDGE:	HON. JEFF WEILL SR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: KAYLYN HAVRILLA McCLINTON
DISTRICT ATTORNEY:	ROBERT SHULER SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART - 05/26/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., WESTBROOKS AND C. WILSON, JJ.

BARNES, C.J., FOR THE COURT:

¶1. After a five-day trial in the Hinds County Circuit Court, Loren Shell-Blackwell (Blackwell) was convicted of capital murder[1] and automobile theft. The trial court sentenced her to life imprisonment without eligibility for parole for the capital murder

[1] Blackwell had been indicted for acting in concert with and/or aiding, abetting, assisting or encouraging her co-defendant, Walter Young, in killing the victim, Lee Kendrick, during a robbery, when she took money from him.

conviction and to serve five years for auto theft, set to run consecutively to her life sentence, in the custody of the Mississippi Department of Corrections.

¶2. On appeal, Blackwell raises three issues: (1) the State introduced irrelevant and prejudicial prior bad-act evidence; (2) the verdict was contrary to the weight of the evidence; and (3) the jury was improperly instructed on the auto-theft charge. We find no reversible error with the capital murder conviction and affirm. On the auto-theft conviction, we find the jury instruction was given in error because it omitted the value of the vehicle, which is a fact required to establish the sentencing range. Accordingly, we reverse and remand on the auto-theft conviction.

STATEMENT OF FACTS

¶3. On September 1, 2015, Lee Kendrick, an eighty-year-old man from Pearl, Mississippi, was reported missing to the police by his daughter. Kendrick had not come home the night before to care for his wife, who had Alzheimer's disease. His last known whereabouts were in bringing his wife lunch at their home at noon on August 31, 2015. Televised news and social media broadcast Kendrick's photograph, stating he was missing.

¶4. On September 1, after seeing the news reports, a couple from Clinton, Mississippi, contacted the Pearl Police Department. They reported that Kendrick, a fence contractor, had been at their home between 3:00 p.m. and 4:00 p.m. on August 31, 2015, to give an estimate on a new fence and pick up a $1,600 cash deposit. When Kendrick did not show up to start the next day, as scheduled, and could not be reached, they became concerned and contacted law enforcement.

¶5. Investigators were able to track the last location of Kendrick's cell phone to the Keele Street area in Jackson, Mississippi. The phone had been there since 4:30 p.m. on August 31, 2015. On September 2, 2015, Kendrick's body was discovered on the bedroom floor of a dirty, vacant apartment at the Cedarstone Apartments near Keele Street. He had been shot once in the back of the head. His body was nude except for socks and a strap-on dildo pulled half-way up his thighs. His cell phone, watch, and glasses were found neatly placed in his shoes near his body, as was his folded red-checkered shirt. His pants were not found, and his vehicle was missing.

¶6. Investigators recovered one spent projectile from inside the apartment's bedroom wall. A small mattress was on the bedroom floor. The dildo on Kendrick's body had a condom on it, which law enforcement swabbed for DNA evidence. Ultimately, the test results showed the DNA on the condom matched Blackwell's DNA. The pathologist who performed Kendrick's autopsy found no stippling or soot around the fatal head wound entrance or tract, concluding it was a distant entry wound, meaning the weapon was fired at about two or more feet away. The pathologist opined that due to where the bullet was recovered, Kendrick's head was down when he was shot.

¶7. Data from Kendrick's cell phone led authorities to Blackwell, a white female, who became a suspect on September 3. Her photograph was subsequently broadcast on the news. Blackwell had met Kendrick when she worked as a prostitute at a Jackson brothel, a job she later quit when she claimed Kendrick became her "sugar daddy." Blackwell stated she had been seeing Kendrick daily since May 2015. During the time they had known each other,

Kendrick had done a great deal for Blackwell—he found her a place to stay, bought her food and cell phones, and even purchased a used vehicle for her.

¶8. Jackson police extracted the contents of Kendrick's cell phone, which included call records, text records, and photographs. Four extracted photographs were of a white female and a black male engaged in sexual intercourse; however, no faces were shown. The investigator performing the data extraction explained that cell-phone photograph files incorporate GPS coordinates. Combining this information with Internet mapping disclosed that the four explicit photographs were taken on August 14, 2015, at the Mustang Motel on Northside Drive in Jackson.

¶9. Detectives worked with Kendrick's cell-phone carrier to determine the approximate location of Kendrick's cell phone on August 31 by "pings" on cell towers. In this way, they were able to map Kendrick's route during his activities that day and compare it to the events described by the suspects.

¶10. Blackwell had rented a room in Jackson during the summer of 2015 from a woman named Dorothy Lewis, who testified for the State at trial. Blackwell paid for one week but only slept in the room one night. Lewis testified that Kendrick paid for Blackwell's room for the next two weeks. Kendrick had also purchased a yellow Mustang for Blackwell, but Blackwell subsequently sold it. Lewis testified that on one occasion Kendrick had come to her house looking for Blackwell, and Lewis had noted his vehicle—a silver 2002 Buick LeSabre. When Lewis saw the news reports that Kendrick was missing, she recalled seeing Blackwell on August 31 in the late afternoon at a Jubilee convenience store on Highway 80

in Jackson, in the same type of vehicle. In the parking lot, she saw Blackwell exit the passenger side. A black male was driving, and there appeared to be an individual in the back seat. Lewis called the Pearl Police Department, reporting this information and giving them a photograph of Blackwell.

¶11. Jackson law enforcement obtained the surveillance video from the Jubilee store where Lewis saw Blackwell in Kendrick's vehicle. In the video, Blackwell exits the passenger side of the LeSabre and walks to a black pick-up truck. There were two black male occupants in the LeSabre who were later identified as Shaddarine Lindsey, Blackwell's boyfriend, and Walter Young, Lindsey's cousin. The surveillance video was also played on the news once Kendrick was determined to be missing.

¶12. On September 5, 2015, Blackwell turned herself in to the Jackson Police Department. She was interviewed twice that day and once on September 9, recounting different versions of events in each interview. Initially, Blackwell adamantly denied being in the vacant apartment with Kendrick. However, as law enforcement presented Blackwell with increasing evidence to incriminate her, she finally admitted to being in the apartment's bathroom when Kendrick was shot; however, she still denied witnessing or participating in his murder.

¶13. Blackwell recounted to law enforcement the following events of August 31. Kendrick picked her and Young up in Jackson after Kendrick had been to Clinton about a fence deposit, a transaction Blackwell had been made aware of earlier in the day. Blackwell, Young, and Kendrick ended up at the vacant Cedarstone apartment on Keele Street for the

purpose of Kendrick's having sex with Blackwell and another prostitute, who never arrived. Blackwell claimed Young was in the bedroom alone with Kendrick. She denied that Lindsey was present.[2]

¶14. Blackwell claimed she heard a gunshot, and Young came rushing out of the bedroom. Blackwell and Young fled in Kendrick's vehicle, with Young holding a bag that contained some of Kendrick's belongings. They hid the gun alongside a road under a mattress and threw Kendrick's pants in a dumpster. According to Blackwell, then they picked up Lindsey and went to the Jubilee store parking lot on Highway 80 to buy some marijuana before the three individuals drove to Jefferson County, Franklin County, and Adams County. While driving, Blackwell was pulled for over speeding and given a ticket.

¶15. Additionally, Blackwell disclosed during police interviews that in August 2015, Kendrick had paid her and Lindsey to have sex in a motel room while Kendrick watched and photographed them. This encounter was the likely origin of the August 14 lewd photographs on Kendrick's cell phone. Additionally, at trial, another motel incident was discussed during lead investigator Ella Thomas's testimony, over defense counsel's objection. At this time, portions of Blackwell's police interview were entered into evidence. During the interview, Blackwell recounted an incident that occurred about one month prior to Kendrick's murder, when Blackwell and Kendrick took a shower together in a motel room. Lindsey and Young allegedly entered the motel room with a key and stole $1,500 in

[2] Young was subsequently indicted as Blackwell's co-defendant. Lindsey was never charged with a crime, even though he provided an alibi, which could never be verified. Blackwell was pregnant with Lindsey's child at the time of the murder.

cash from Kendrick while he was in the shower.

¶16. On September 8, 2015, Young turned himself in to the Jackson Police Department, where he was interviewed twice and ultimately charged with capital murder and auto theft. Young, however, denied any knowledge or involvement in Kendrick's robbery and murder. Ultimately, he stated that Lindsey and Blackwell were trying to frame him for Kendrick's murder. Later, at Blackwell's trial, Young admitted he was not telling the truth to law enforcement. Imprisoned and awaiting his own trial, Young testified that he witnessed Blackwell shoot Kendrick, with Lindsey present in the bedroom.[3] He went to the Cedarstone Apartments with Lindsey, Blackwell, and Kendrick. Upon their arrival, Young was told to stay in Kendrick's vehicle while the other three individuals went into the apartment. After a short time, however, he too decided to enter the vacant apartment. Proceeding to the bedroom, Young saw Blackwell and Lindsey standing behind Kendrick, who was wearing only a t-shirt and putting on a dildo. Blackwell, standing behind Kendrick, was wearing a t-shirt and no pants. Blackwell was pointing a handgun at Kendrick's head, with a plastic bag and some paper wrapped around her hands. While Kendrick was strapping on the dildo, Blackwell put the gun a few inches from Kendrick's head and shot him from behind. Kendrick fell to the ground. Blackwell and Lindsey began "rushing around" collecting some of Kendrick's belongings. Blackwell told Young "don't say nothing" while pointing the handgun at Young. They all ran outside, and Lindsey told Young to drive Kendrick's vehicle. Blackwell and Lindsey eventually threw the gun out of

[3] After Blackwell's trial, Young pleaded guilty to one count of accessory after the fact to capital murder and one count of auto theft.

the vehicle's window. It was never recovered.

¶17. Young was told to drive to the Jubilee store, where Blackwell bought marijuana from a "partner" in a black pick-up truck. Young claimed Lindsey had a gun on his lap while Young drove. Young testified he did not know there was $1,600 in cash under the driver's seat of Kendrick's vehicle, but he did see "a good amount of money" that Blackwell obtained from under the seat to buy drugs. These funds were never recovered during the investigation. After the drug buy, Lindsey told Blackwell to drive, and they traveled to the Natchez area, where Blackwell had family and friends. Young testified that on the way, Blackwell was pulled over by a state trooper and given a ticket.

¶18. At trial, Blackwell's grandmother, Betty Newman, was called by the State. She testified that Blackwell, Lindsey, and Young arrived unannounced at her home in Roxie, Mississippi, at about 10:00 p.m. on August 31. They arrived in a silver LeSabre, which Blackwell said they had "borrowed." Newman sensed something was wrong and asked them to leave. Newman was aware of Blackwell's relationship with Kendrick and how Kendrick had helped Blackwell with housing and food.

¶19. Blackwell then called a longtime friend, Zachary Shell, and tried to sell him Kendrick's vehicle for $300 to $400—a price he thought was suspiciously low. Shell testified the vehicle was in good condition and worth about $3,000 to $5,000. He declined the offer when Blackwell could not find the title. That night, Blackwell, Lindsey, and Young stayed in a motel. Young testified that Blackwell and Lindsey began arguing in the room. Blackwell was upset and told Lindsey, "You had me kill him."

¶20. Young testified that the next day, Blackwell went to the mall and bought clothing and jewelry for Lindsey. Blackwell then went to the hospital because she was having issues with her pregnancy. Lindsey called one of his ex-girlfriends to come take Young and Lindsey to Jackson, leaving Blackwell behind to hitch-hike back to Jackson.

¶21. Newman testified that on September 1, she saw news reports about Kendrick, along with photographs of the silver LeSabre she had seen Blackwell arrive in the day before. When Newman learned Kendrick's body was found, Blackwell told Newman not to tell law enforcement she had seen her. Shell also testified that Blackwell told him not to tell anyone he had seen her in Roxie. When Shell saw the news reports about Kendrick, he recognized Kendrick's vehicle as the one Blackwell tried to sell him and contacted the Hinds County Sheriff's Office. Ultimately, Kendrick's LeSabre was found abandoned in Jefferson County without a tag. Detective Thomas testified that the vehicle's estimated value was $7,500 to $8,000.

¶22. Additional facts will be developed as needed.

ANALYSIS

1. Prior Bad-Act Evidence

¶23. Blackwell contends her trial was unfair and her conviction should be reversed due to the erroneous admission of evidence concerning two prior bad acts by Blackwell. The admission or exclusion of evidence is reviewed under an abuse-of-discretion standard. *Williams v. State*, 234 So. 3d 1278, 1288 (¶38) (Miss. 2017). "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Where error involves

the admission or exclusion of evidence, [the reviewing court] will not reverse unless the error adversely affects a substantial right of a party." *Id.* (citations and internal quotation marks omitted).

¶24. Mississippi Rule of Evidence 404(b)(1) provides, "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." This evidence, though, "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." M.R.E. 404(b)(2). Additionally, if the evidence meets one of these exceptions, it must be filtered through Rule 403. If the evidence is determined to be more probative than prejudicial, it may be admitted, with the trial court's giving an instruction to the jury explaining the limited purposes for which the evidence may be considered. *Derouen v. State*, 994 So. 2d 748, 756 (¶20) (Miss. 2008).

¶25. Blackwell contends there were two incidents of prior bad acts presented to the jury which prejudiced her. The first incident was the prior theft from Kendrick in a motel room about a month before his murder, involving Young and Lindsey. When Detective Thomas was called to the stand, portions of Blackwell's lengthy video-recorded statements, which were given to Detective Thomas days after the murder, were to be played for the jury. The defense reminded the trial court of its "prior bad acts" motion regarding the end of the video where Blackwell recounts the theft. The State made a brief proffer on this portion of the video and Detective Thomas's testimony describing the incident. Defense counsel requested

the reference be excluded because it implied that Blackwell had recently conspired with Lindsey and Young to set up a prior theft from Kendrick.

¶26. Detective Thomas testified to Blackwell's statement about the prior incident during the three-minute portion of the video-interview:

> She stated that they got a hotel room. [Young] got the room because he [was] the only [person who] had an ID to get the room. And she said that once her and Mr. Kendrick was in the room, she asked him to take a shower with her. And once they got in the shower, when they came back out, Mr. Kendrick noticed he had money missing[,] as well as a cell phone was missing from his belongings.

Blackwell told Detective Thomas that Lindsey and Young had robbed Kendrick of the $1,500. Blackwell stated she knew Lindsey and Young were already staying at the motel when she took Kendrick there, but Kendrick was not aware of this fact.

¶27. The State argued admission of the prior bad act was relevant and probative because it related to "plan, lack of mistake, motive." The State further explained that during the defense counsel's opening statement, he related the defense theory that Young "found a girl" who would have "a threesome" with Blackwell and Kendrick in the vacant apartment, but unbeknownst to Blackwell, Young robbed Kendrick. However, the State claimed Blackwell's admission in her video statement of the prior theft was probative of a plan and motive in this case. The State stressed that Blackwell knew from the prior incident that Kendrick had been robbed by Young and Lindsey when she took him to a location for the purpose of sex. The trial court found the portion of the video statement was admissible under Rule 404(b)(2), and that it was "not substantive evidence in this trial." No limiting instruction was requested at this point, but the defense made a continuing objection to the

proffer.

¶28. Blackwell's video-recorded statements were then played for the jury, with the prosecutor periodically pausing the video to ask Detective Thomas questions about Blackwell's interview. Detective Thomas noted Blackwell was aware that "Kendrick always had money." When the prosecutor asked Detective Thomas what the $1,500 incident was that Blackwell referenced in her interview, Thomas stated it was "when they robbed him at the motel on August 1st." Defense counsel then objected and moved for a mistrial due to Thomas's use of the term "robbed," which he claimed was beyond both his motion to preclude bad acts and the trial court's ruling. During a bench conference, the State explained the term "robbed" was used by Blackwell in the interview "colloquially." The trial court found Detective Thomas's testimony was within the proffer, and accordingly overruled the objection, denied the motion for a mistrial, and requested the prosecutor clarify to the jury Thomas's use of the term "robbed," which she did as follows:

> Q. Detective Thomas, you just said that they robbed Mr. Kendrick. Did you actually mean that they came at gunpoint and robbed him?
>
> A. No.
>
> Q. What did you mean?
>
> A. They came into the hotel room -- where she and Mr. Kendrick was in the shower -- and took $1500 out of his pants pocket.
>
> Q. So he -- they didn't actually confront him?
>
> A. No.
>
> Q. And are we -- is that what we're about to hear, her description of that situation?

A. Yes.

(Whereupon, video recording played.)

. . . .

Q. What was significant about that last story that she told to your investigation? . . . And by "that last story," I mean the story that she just told about getting the room at the Select 10 or the Best Value Inn and them getting the room; and Mr. Lee coming to pay for the rest of the week, and trying to hide from Lee Kendricks [sic] and the hotel employee that other two people were there; what was significant about that story?

A. That she set him up so they could come in and take his money. She knew he had money. She knew he keep money on him.

Q. And so it was that she had, sort of, done it before?

A. Yes.

¶29. The issue was revisited on the redirect examination of Detective Thomas. When the prosecutor asked what evidence there was against Blackwell, Thomas stated, "Her DNA evidence present at the crime scene; she admitted being there during the time; she admitted knowing that Mr. Kendrick went and picked up a large sum of money for a fence job; she had set up a robbery previously and knowing that he had his money --." Defense counsel objected that the prosecutor and Detective Thomas were characterizing "some alleged incident prior" at the motel as evidence against Blackwell in this case, and defense counsel again moved for a mistrial. The trial court denied the motion, stating the issue had already been addressed and clarified, but requested the prosecutor rephrase and clarify her question. Defense counsel requested an instruction for the jury to disregard the last answer, which the trial court granted. The prosecutor then asked Detective Thomas to explain again the

incident at the motel. She stated, "Loren had Mr. Kendrick meet her at the hotel. Walter [Young] and Shadarrine [Lindsey] was there waiting. Once they -- Loren and Mr. Kendrick got inside the room, she convinced Mr. Kendrick to take a shower with him [sic]."[4] The prosecutor then asked Thomas:

> Just to be clear, Detective, in the last part of her last interview on 9/9, Loren is talking about a situation that occurred prior to the murder at the hotel. And . . . she said Shadarrine and Walter were secretly there. And when Mr. Kendrick didn't know about, they came in and took some money?

Detective Thomas responded, "Correct."

¶30. The other incident was mentioned briefly during the testimony of Blackwell's grandmother, Betty Newman, about Blackwell's unauthorized use of her debit card. During direct examination, the prosecutor asked Newman whether Blackwell had ever asked her for money in the past, and Newman responded affirmatively that she had helped Blackwell financially. Newman also testified that Blackwell's boyfriend Lindsey had asked her for money for the couple's two young children once Blackwell was imprisoned. In reference to this testimony, on cross-examination Newman was asked if she felt like Blackwell and Lindsey were taking advantage of her, and she responded in the negative. On redirect, the prosecutor asked Newman if anything had ever come up missing in her home when Blackwell visited in the past. Defense counsel objected, and initially the trial judge sustained the objection but then reversed his ruling when the prosecutor argued that defense

[4] Defense counsel objected again and moved for a mistrial, claiming there was nothing in Blackwell's statement where she convinced Kendrick to take a shower or set him up to be robbed. The trial judge overruled the objection, denied the mistrial, and asked the prosecutor to clarify.

counsel's question during cross-examination about "being taken advantage of" had "opened the door" to the evidence. The prosecutor asked the question again, and Newman responded that Blackwell had used her debit card without permission once for a small online purchase regarding a telephone.

¶31. Blackwell contends the mention of these prior bad acts was irrelevant and more prejudicial than probative. She claims there was "no proof" she set up or even knew about Young and Lindsey's prior theft of Kendrick in the motel room; there was just "suspicion and insinuation" about "speculative and inconclusive" evidence. Additionally, she argues the trial court improperly failed to perform a Mississippi Rule of Evidence 403 balancing test and failed to provide a limiting instruction to the jury.

¶32. The State argues that both incidents were probative and admissible, showing a plan, motive, intent, and preparation to rob Kendrick. We agree. The reviewing court utilizes a two-part analysis to determine whether the admission of other crimes, wrongs, or acts was proper: "the evidence offered (1) must 'not be admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character' and (2) 'its probative value is not substantially outweighed by a danger of . . . unfair prejudice . . . .'" *Johnson v. State*, 204 So. 3d 763, 768 (¶15) (Miss. 2016) (citing M.R.E. 404(b)(1)-(2); M.R.E. 403)). Federal courts have explained that for Federal Rule of Evidence 404(b) "other acts" evidence, "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689 (1988). "The standard of proof of such

preliminary facts is relatively light." *United States v. Anderson*, 933 F.2d 1261, 1269 (5th Cir. 1991). "Although a preliminary judicial finding under Federal Rule of Evidence 104(a) that the extrinsic act occurred is not required, relevancy does command the proponent of the 404(b) testimony to tender sufficient proof to permit a reasonable jury to find the existence of the conduct by a preponderance of evidence." *United States v. Osorio*, 288 F. App'x 971, 975 (5th Cir. 2008) (citing *Huddleston*, 485 U.S. at 688-90).[5]

¶33. Here, the jury could reasonably find by a preponderance of evidence that the preliminary fact that the prior theft occurred and that Blackwell, by her own admission, was present under circumstances similar to those leading to Kendrick's murder. Previously, Blackwell and Kendrick were engaged in sexual activity when he was robbed by Blackwell's boyfriend, who had access to the room. Even if Blackwell did not plan that theft, she stated in the video that she knew Lindsey and Young were staying in that motel room and that Lindsey had a key. Blackwell also stated she knew Kendrick always carried large amounts of cash due to his fence business. The prior incident also directly relates to the defense's theory of the case that Blackwell was going to participate in a "threesome" at Kendrick's request, in a vacant apartment, which Young had arranged, and who was also involved in the prior theft.

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[5] Although *Huddleston* is several decades old, most state supreme courts have not revisited "the standard of proof for establishing the defendant's identity as the perpetrator of an uncharged act." In State practice, "[t]he *Huddleston* position has emerged as the prevailing view," but a "significant minority of states" adhere to the clear and convincing evidence standard. Edward J. Imwinkelried, *Uncharged Misconduct Evidence*, § 2:09, at 2-51 (2005). The Mississippi Supreme Court has applied the *Huddleston* standard in multiple cases. *E.g.*, *Roberson v. State*, 199 So. 3d 660, 668-69 (¶34) (Miss. 2016).

¶34. At the very least, the prior theft showed Blackwell knew she was putting Kendrick in a vulnerable situation at the vacant apartment, where he could be robbed while engaged in sexual activity. As on the prior occasion, it was Blackwell who was aware Kendrick had a large amount of cash. There is no explanation in the record of how Lindsey or Young would have known but for Blackwell's informing them that Kendrick had obtained $1,600 cash that afternoon. With the help of Lindsey, she brought Kendrick to the apartment with the promise of sex, but instead it ended in his robbery and murder. There did not need to be evidence that Blackwell conspired with Lindsey and Young to rob Kendrick in the prior incident, as Blackwell suggests, in order for the incident to be admissible. Moreover, the prior act established Blackwell's own motive and plan to rob Kendrick because she knew he always carried cash. Further, the jury could reasonably find that the testimony of Newman regarding the unauthorized debit-card usage furthers Blackwell's motive and intent to rob Kendrick due to her financial difficulties.

¶35. While the trial judge did not perform an explicit on-the-record balancing analysis, the bench conferences show he carefully weighed the value of the evidence against its possible prejudice. The trial judge took steps to allay any prejudice by requesting the prosecutor clarify her questions to Detective Thomas, especially with regard to Thomas's use of the term "robbery" to describe the prior theft. The trial judge also granted defense counsel's request for a limiting instruction, telling the jury to disregard Detective Thomas's last answer using the term, before clarifying her testimony.

¶36. Blackwell also argues, for the first time, that Detective Thomas needed to be qualified

as an expert to give her opinion that Blackwell was setting up Kendrick in the motel incident. Blackwell made no specific objection to that testimony at all. "Issues not raised below may not be raised for the first time on appeal because 'the trial court cannot be put in error, unless it has had an opportunity of committing error.'" *Strohm v. State*, 923 So. 2d 1055, 1057 (¶5) (Miss. Ct. App. 2006) (quoting *Stringer v. State*, 279 So. 2d 156, 158 (Miss. 1973)). This argument was not raised before the trial court; accordingly, it is waived.

¶37. Blackwell further argues the admission of testimony about the misuse of her grandmother's debit card was reversible error because there was no "factual or probative connection" with this act and her capital murder charge, citing *Robinson v. State*, 42 So. 3d 598, 603 (¶16) (Miss. Ct. App. 2010). In *Robinson*, this Court reversed the defendant's conviction for burglary of a building, in part because the State's admission of his prior conviction for attempted grand larceny (even though a similar crime) failed to show a "probative link or interconnecting evidence" with the current charge and constituted impermissible character evidence. *Id.* Again, the debit-card usage showed Blackwell's motive for robbery because she needed money for herself and her children, and the murder occurred during the robbery.

¶38. Neither of these incidents were impermissible character evidence. Accordingly, the trial court did not abuse its discretion in admitting testimony about these two prior incidents as they were exceptions under Rule 404(b)(2).

Ineffective Assistance of Counsel

¶39. As a related issue, Blackwell argues her counsel's assistance was constitutionally

deficient for failing to request a Mississippi Rule of Evidence 105 limiting instruction after the above evidence was admitted. Rule 105 states the trial court "shall restrict the evidence to its proper scope, contemporaneously instruct the jury accordingly, and give a written instruction if requested." "Whether to request such an instruction is a matter of trial strategy in the exclusive province of the defendant, in consultation with his or her attorney." *Tate v. State*, 912 So. 2d 919, 928 (¶28) (Miss. 2005). "This Court rarely second guesses trial counsel regarding matters of trial strategy." *Nichols v. State*, 27 So. 3d 433, 443 (¶36) (Miss. Ct. App. 2009).

¶40. Ineffective assistance of counsel is a question of law reviewed de novo and involves a two-part analysis: "the defendant must demonstrate that his counsel's performance was deficient" and "that the deficiency prejudiced the defense." *Taylor v. State*, 167 So. 3d 1143 (¶5) (Miss. 2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Smith v. State*, 877 So. 2d 369, 377 (¶12) (Miss. 2004).

¶41. "[G]enerally, ineffective-assistance-of-counsel claims are more appropriately brought during post-conviction proceedings." *Dartez v. State*, 177 So. 3d 420, 422-23 (¶18) (Miss. 2015). However, such claims may be addressed on direct appeal when "(1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." *Johnson v. State*, 196 So. 3d 973,

975 (¶7) (Miss. Ct. App. 2015); *see also Read v. State*, 430 So. 2d 832, 841 (Miss. 1983). Here, the parties stipulate the record is adequate for appellate review; so we shall address the issue.

¶42. Regarding the motel incident, contrary to Blackwell's assertions on appeal, defense counsel requested a limiting instruction to disregard Detective Thomas's answer during redirect examination (although not during initial examination). After deliberating, the trial judge decided such an instruction would not further confuse the jury. He instructed the jurors to disregard Thomas's last answer and asked the prosecutor to reframe the question for clarity. We find no error in this regard.

¶43. Regarding Newman's debit-card testimony during redirect, defense counsel objected immediately, not based upon Rule 404(b) but because the testimony was beyond the scope of direct examination. A bench conference ensued, and the trial judge ultimately decided to admit the testimony because defense counsel "opened the door" to the subject on cross-examination. Defense counsel's objection to testimony he thought prejudicial to the defendant was in no way deficient performance. Further, defense counsel's cross-examination of Newman led to testimony favorable to the defendant—that she did not feel taken advantage of by Blackwell. The fact that a prior bad act was also admitted as a result might well have been a difficult choice made pursuant to trial strategy. "[C]ounsel's choice of whether or not to . . . call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy. This Court rarely second guesses trial counsel regarding matters of trial strategy." *Renfrow v. State*, 202 So. 3d 633, 638 (¶18)

(Miss. Ct. App. 2016) (quoting *Nichols v. State*, 27 So. 3d 433, 443 (¶36) (Miss. Ct. App. 2009)). In this case, we do not find that defense counsel's question that "opened the door" to the prior bad act constituted deficient performance.

II. Weight of the Evidence

¶44. Blackwell argues the guilty verdict was contrary to the weight of the evidence for capital murder because her conviction turns on the testimony of Young, whom she claims was an unreliable witness. Further, Blackwell contends her DNA evidence on the condom only circumstantially proved her presence at the killing, and failed to prove any element of capital murder. Blackwell thus requests this Court reverse her conviction for capital murder and grant her a new trial.

¶45. A motion for a new trial challenges the weight of the evidence. In reviewing such a challenge, "[a] reversal is warranted only if the lower court abused its discretion in denying [the motion] . . . ." *Dilworth v. State*, 909 So. 2d 731, 737 (¶20) (Miss. 2005). The reviewing court must "weigh the evidence in the light most favorable to the verdict." *Little v. State*, 233 So. 3d 288, 292 (¶21) (Miss. 2017). The verdict will only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.* "[T]he power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Amiker v. Drugs For Less Inc.*, 796 So. 2d 942, 947 (¶18) (Miss. 2000). Blackwell was charged for capital murder with the underlying felony of robbery. The statute provides that "[t]he killing of a human being without the authority of law by any means or in any

manner shall be capital murder . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of . . . robbery." Miss. Code Ann. § 97-3-19(2)(e) (Rev. 2014).

¶46. Blackwell argues Young's testimony that she murdered Kendrick was unreliable because he initially lied to police; he had reason to lie to the jury to secure a favorable plea bargain and to protect his cousin Lindsey; and there was contradictory evidence of the murder. Further, she claims the State must not believe Young's account of the homicide regarding Lindsey's involvement because Lindsey was never charged.

¶47. Blackwell acknowledges that, generally, the uncorroborated testimony of an accomplice can be sufficient to sustain a conviction. *Flanagan v. State*, 605 So. 2d 753, 757-58 (Miss. 1992) (citing *Mason v. State*, 429 So. 2d 569, 571 (Miss. 1983)). However, she notes "the general rule is inapplicable in those cases where the testimony is unreasonable, self contradictory or substantially impeached." *Id.*

¶48. At trial, Young admitted to lying during his police interview in September 2015 when he stated he knew nothing about the murder. Young maintained he was telling the truth at trial, when he was still charged with capital murder as a co-defendant and awaiting his own trial. Further, Young denied that he had a plea deal or was promised anything from the State; he explained that he spoke with the prosecution because he did not want anybody to think he murdered Kendrick. Young recounted that once Blackwell turned herself in, Lindsey called him and told Young not to "tell on them" to police. When Young turned himself in a few days after Blackwell, he was scared and crying during the interview,

claiming that Lindsey and Blackwell had set him up and were trying to blame the murder on him. We do not find Young's testimony unreasonable or substantially impeached.

¶49. Further, much of Young's testimony is corroborated by other evidence. Young testified he went to the vacant apartment with Kendrick, Blackwell, and Lindsey. When he entered the apartment he saw Kendrick strapping on a dildo. Blackwell had the gun to Kendrick's head with a plastic bag and paper around her hand. She shot Kendrick in the head from behind. Kendrick did not see what was happening because he was strapping on the dildo. Photographs of the scene corroborate this testimony; the dildo was halfway up Kendrick's thighs and not completely fastened, as if he was interrupted. Young's description of Blackwell's position behind Kendrick is consistent with the autopsy findings and bullet trajectory, which determined Kendrick was shot in the back of the head while looking down. Young also stated that after the murder, he, Lindsey, and Blackwell went to the Jubilee convenience store, which was supported by the surveillance video and testimony of Blackwell's landlord.

¶50. Blackwell notes two instances where Young's testimony was contrary to other evidence. Young claimed Blackwell had the murder weapon within a few inches of Kendrick's head when she shot him. The pathologist, however, testified that because Kendrick's fatal head wound had no stippling or soot, the weapon was fired from two or more feet away. Young also testified that Kendrick was wearing a t-shirt when he was murdered, but there was no t-shirt on his body when it was found. These two discrepancies, however, do not invalidate all of Young's testimony or Blackwell's conviction. It is well

established "when the evidence is conflicting, the jury will be the sole judge of the credibility of witnesses and the weight and worth of their testimony." *Little*, 233 So. 3d at 292 (¶20) (quoting *Gathright v. State*, 380 So. 2d 1276, 1278 (Miss. 1980)). Here, the jury chose to believe Young's version of the murder despite some contradictory evidence.

¶51. Even without Young's testimony that Blackwell murdered Kendrick, the overwhelming weight of the evidence supports Blackwell's conviction for capital murder, with the underlying crime of robbing Kendrick of money, by either committing the crime herself or "acting in concert with, and/or aiding, abetting, assisting or encouraging" Young. She ultimately admitted to Detective Thomas that she was at the scene when the murder occurred, even though she denied being the shooter. Her DNA evidence found on the condom which was attached to Kendrick when he was murdered corroborates her presence. Blackwell was seen later that evening in Kendrick's stolen vehicle by both her landlord and her grandmother. She tried to sell the stolen vehicle. Blackwell told Detective Thomas she had disposed of the murder weapon under a mattress along the side of a road. When she took law enforcement to the location, the mattress was still there even though the weapon was not.

¶52. Viewing the evidence in the light most favorable to the verdict, the trial court did not abuse its discretion in denying Blackwell's motion for a new trial. The jury properly weighed the evidence and found Blackwell guilty of capital murder. The verdict does not sanction an unconscionable injustice.

III. Jury Instruction on Count II

¶53. Blackwell contends the jury was not properly instructed on the value element of Count II for "auto theft" under Mississippi Code Annotated section 97-17-42(1) (Rev. 2014). While the indictment included a monetary range for the value of a stolen vehicle, the jury instruction did not. Citing *Richmond v. State*, 751 So. 2d 1038 (Miss. 1999), Blackwell claims this variance constructively amended the indictment; she was not charged with auto theft but grand larceny, and this variance improperly altered the elements of proof necessary for conviction. She requests this Court reverse her conviction on Count II and grant her a new trial on this charge.

¶54. The standard of review for jury instructions is well established:

> Jury instructions are generally within the discretion of the trial court and the settled standard of review is abuse of discretion. The instructions are to be read together as a whole, with no one instruction to be read alone or taken out of context. When read together, if the jury instructions fairly state the law of the case and create no injustice, then no reversible error will be found.

Bailey v. State, 78 So. 3d 308, 315 (¶20) (Miss. 2012) (citations and internal quotation marks omitted).

¶55. Blackwell's indictment charged her with "auto theft" under section 97-17-42 (Rev. 2014). Although not mentioned by either party, the Mississippi Legislature amended this statute,[6] effective July 1, 2014, to base punishment on the value of the vehicle, by reference

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[6] The statute provides:

> Any person who shall, willfully and without authority, take possession of or take away a motor vehicle of any value belonging to another, with intent to either permanently or temporarily convert it or to permanently or temporarily deprive the owner of possession or ownership, and any person who knowingly shall aid and abet in the taking possession or taking away of the motor vehicle, *shall be guilty of larceny and shall be punished based on the value of the*

to the grand larceny and petit larceny statutes, sections 97-17-41 and -43, respectively. Prior to this amendment, the auto-theft statute made no reference to the value of the vehicle and provided a sentence of not more than five years. *See* Mississippi Code Annotated section 97-17-42(1) (Supp. 2013).

¶56. Count II of Blackwell's indictment included the vehicle's range of value from $5,000 to $25,000:

> [Blackwell] did willfully, unlawfully, feloniously and without authority, take possession of or take away a motor vehicle with a value of more than $5,000.00 but less than $25,000.00, the property of Lee Kendrick[], with the intent to either permanently or temporarily deprive the owner of possession or ownership of said vehicle, or to either temporarily or permanently convert to his own use, said vehicle being a 2002 Buick La saber, VIN # . . . in violation of Mississippi Code Annotated 97-17-42(1).

Pursuant to section 97-17-41(2), punishment for taking property of this value would be imprisonment for up to ten years.

¶57. During the jury instruction conference, defense counsel stated he preferred jury instruction D-5 over S-4 because it "properly captures the value element." The trial judge stated the substitution was "reasonable," but the prosecutor objected, stating "the State doesn't have to prove value." Defense counsel interjected, "We'll take a misdemeanor then." The trial judge asked, "[S]o the indictment said 5,000 to 25[000] and you're saying the statute doesn't call for that?" The State again represented the statute does not require

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> *motor vehicle involved according to the schedule in Section 97-17-41. If the value of the motor vehicle involved is One Thousand Dollars ($1,000.00) or less, the person shall be punished according to the schedule in Section 97-17-43.*

Miss. Code Ann. § 97-17-42(1) (Rev. 2014) (emphasis added).

a value range for auto-theft. The defense maintained that because the State proved value during its case-in-chief, instruction D-5 was proper. The trial court, though, refused it and gave instruction S-4A.

¶58. We find reversible error, but for different reasons than those argued by Blackwell. "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Fogleman v. State*, 283 So. 3d 685, 689 (¶13) (Miss. 2019) (quoting *Alleyne v. United States*, 570 U.S. 99, 113 (2013)), *cert. petition filed*, No. 19-7794 (U.S. Feb. 27, 2020). In reaching this conclusion, *Alleyne* recited the common-law practice "of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment." *Alleyne*, 570 U.S. at 109-110. The Court specifically referenced the crime of larceny, where if the statute established levels of sentencing based on the value of the property, value became an element of the offense. *Id.* at 110 (citing *Hope v. Commonwealth*, 50 Mass. 134 (1845)).

¶59. Here, the trial court's giving the jury instruction was done in error because the instruction failed to include the value element, which determines the statutory sentencing range. "Failure to submit to the jury the essential elements of the crime is 'fundamental error.'" *Shaffer v. State*, 740 So. 2d 273, 282 (¶31) (Miss. 1998) (citing *Hunter v. State*, 684 So. 2d 625, 636 (Miss. 1996)).

> A conviction is not valid where the prosecution does not prove each element of the charged offense beyond a reasonable doubt. It follows that a conviction is unenforceable where the jury does not find each element of the offense beyond a reasonable doubt. Where the jury is not even instructed on one of the

> vital elements of the offense, the conviction must not survive the scrutiny of this Court.

Id. at (¶32) (citation omitted). *Alleyne* determined "that a fact increasing either end of the [sentencing] range produces a new penalty and constitutes an ingredient of the offense." *Alleyne*, 570 U.S. at 112. Because the State's jury instruction erroneously omitted the vehicle's value which is a factual finding the jury must make to determine the sentencing range, we find it necessary to reverse this conviction and remand for a new trial.

CONCLUSION

¶60. Based upon the foregoing, we affirm Blackwell's conviction of capital murder and sentence of life imprisonment without eligibility for parole. On Blackwell's conviction for auto theft, we reverse and remand for a new trial.

¶61. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

CARLTON AND J. WILSON, P.JJ., GREENLEE, WESTBROOKS, TINDELL, McDONALD, LAWRENCE AND C. WILSON, JJ., CONCUR. McCARTY, J., NOT PARTICIPATING.